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No. 94-1387

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

*Petitioners,*

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit incorrectly decide that the damages, if any, available to survivors of the victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)?

2. Under 28 U.S.C. § 1292(b), can the Courts of Appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court?

## PARTIES TO THE PROCEEDINGS BELOW

### Petitioners/Defendants Below

Yamaha Motor Corporation, U.S.A. ("YMUS") was incorporated in California in 1976. Its principal place of business is 6555 Katella Avenue, Cypress, CA 90630. YMUS markets and distributes Yamaha motorized products including motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars.

Yamaha Motor Company, Ltd. ("YMC") was incorporated in Japan in 1955. Its principal place of business is 2500 Shingai, Iwata-Shi, Shizuoka-Ken, Japan. YMC manufactures motorcycles, all-terrain vehicles, boats, personal watercraft, snowmobiles, go-karts, generators and golf cars. YMC owns 100% of the stock of YMUS.

### Respondents/Plaintiffs Below

Respondents, Lucien B. Calhoun and Robin L. Calhoun, both residents of the Commonwealth of Pennsylvania, are the parents of Natalie K. Calhoun, deceased, and are also the administrators of her estate.

### Other Parties/Defendants Below

Palmas Del Mar Company; Palmas Del Mar, Inc.; Palmas Yacht Club, Inc.; Maxxam Properties, Inc.; ABC Corporation; XYZ Partnership(s); Candelero Hotel Corporation; and Marina De Palmas Shipyard, Inc. were named as defendants in the suit below. However, these parties

PARTIES TO THE PROCEEDINGS BELOW – Continued

were dismissed without prejudice from this action by stipulation approved by the district court below on February 12, 1991. Pet. App. 86a.

**Rule 29.1 Statement**

YAMAHA CORPORATION

*Subsidiaries and Affiliates*

- Yamaha Motor Company, Ltd.
- Yamaha Motor Corporation, U.S.A.
- Yamaha Motor Manufacturing Corporation of America (incorporated in the State of Georgia)

While there are other Yamaha subsidiaries and affiliates, they are either wholly-owned and/or not publicly traded.

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Estate of Natalie K. Calhoun, Deceased,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

## BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The memorandum opinion and orders of the district court below (Pet. App. 51a) are reported at No. Civ. A. 90-4295, 1993 WL 216238 (E.D. Pa., June 22, 1993).[1] The

[1] The district court opinion originally recited from the bench on December 24, 1992 was not formally issued by the court in written form until June 17, 1993.

combined order denying Yamaha's motion for reconsideration and certifying the issue for immediate interlocutory appeal (Pet. App. 73a) is reported at No. Civ. A. 90-4295, 1993 WL 197319 (E.D. Pa., June 2, 1993). The district court's order amending certification to include plaintiffs' questions (Pet. App. 78a) is reported at No. Civ. A. 90-4295, 1993 WL 218833 (E.D. Pa., June 21, 1993). The court of appeals' orders granting permission for interlocutory appeal pursuant to Fed. R. App. P. 5(a) and consolidating the appeals are not reported, but were included in the Certiorari Petition's appendix at 84a. The opinion and judgment of the court of appeals (Pet. App. 1a and 44a), as amended (Pet. App. 47a), are reported at 40 F.3d 622 (CA3 1994). The court of appeals' order upon denial of a petition for rehearing with suggestion for rehearing in banc (Pet. App. 49a) is reported at 40 F.3d 622, 645 (CA3 1994).

## JURISDICTION

The judgment of the court of appeals was entered on November 2, 1994 (Pet. App. 44a) and a timely petition for rehearing was denied on December 7, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on February 17, 1995, and was granted by Order entered on May 22, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

**U.S. Const. art. III, § 2:**

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

**28 U.S.C. § 1333:**

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

## STATEMENT OF THE CASE

### I. Factual Background

On July 6, 1989, Natalie Calhoun, the 12-year-old daughter of respondents Lucien B. and Robin L. Calhoun, was killed when the rented personal watercraft she was operating collided with a vessel anchored in navigable territorial waters off the coast of Puerto Rico.[2] The personal watercraft was a "WaveJammer" model manufactured by Yamaha Motor Company, Ltd. and distributed

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[2] "Territorial seas," with respect to the United States, are defined as "the waters within the belt, three (3) nautical miles wide adjacent to its coast and seaward of the territorial sea baseline." 33 C.F.R., Ch. 1, § 2.05-5(a) (1988). United States maritime law will be applied to territorial waters surrounding Puerto Rico since by virtue of the Federal Relations Act, 48 U.S.C. § 749, Congress placed under the control of the Commonwealth of Puerto Rico its harbor areas and navigable bodies of

by Yamaha Motor Corporation, U.S.A. ("Yamaha"). Although they presumably incurred funeral expenses, the Calhouns have not alleged they were in any way financially dependent on their daughter.

By complaint filed on June 27, 1990 (and amended on August 10, 1990), Mr. and Mrs. Calhoun, individually and in their capacities as administrators of their daughter's estate, sued Yamaha in the United States District Court for the Eastern District of Pennsylvania[3] seeking recovery under the Pennsylvania wrongful death[4] and survival[5] statutes. Federal jurisdiction was founded on both diversity of citizenship[6] and admiralty.[7] The Calhouns have alleged theories of negligence, strict liability, and breach of implied warranties, and seek recovery for damages including lost future earnings, loss of society, loss of support and services, funeral expenses and punitive damages. Yamaha has denied these allegations by responsive pleading filed on August 17, 1990.

---

water. In that same statute, it is stated that all laws of the United States for the protection and improvement of navigable waters of the United States and the preservation of navigation and commerce shall apply to Puerto Rico and its waters. *Caraballo v. Autoridad de Los Puertos de Puerto Rico*, 388 F. Supp. 308 (D.P.R. 1974).

[3] Lucien and Robin Calhoun are residents of the Commonwealth of Pennsylvania. Natalie Calhoun's estate is also being administered in Pennsylvania.

[4] 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994).

[5] 42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994).

[6] 28 U.S.C. § 1332 (1993).

[7] 28 U.S.C. § 1333 (1993).

## II. Proceedings Below

On November 27, 1991, Yamaha moved for partial summary judgment, asserting that damages recoverable, if any, were to be determined under the federal general maritime cause of action announced by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), rather than the Pennsylvania remedial statutes referenced above. Because the accident in question occurred on navigable waters and resulted from traditional maritime activity, and since the facts of this case did not bring it within the parameters of any of the maritime statutory remedies, Yamaha argued that the damages recoverable must be determined pursuant to the federal common law of admiralty. Yamaha further asserted that under general maritime law, plaintiffs were not entitled to recover lost future wages, loss of society or punitive damages. The district court held that (1) the federal common law of admiralty governed the Calhouns' wrongful death and survival claims;[8] (2) the general maritime death action, announced in *Moragne*, displaced Pennsylvania wrongful death and survival statutes;[9] and (3) under this federal maritime common law remedy, lost future wages and

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[8] *See* March 19, 1992 district court order granting summary judgment to the extent plaintiffs' claims are to be determined under the law of admiralty. Pet. App. 51a.

[9] *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). Pet. App. 65a-66a.

punitive damages could not be awarded, but loss of society and loss of support and services were compensable.[10]

After rejecting Yamaha's motion for reconsideration, the district court agreed to certify the question of whether loss of society was a proper element of damages under the general maritime death action to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). Pet. App. 73a. The Calhouns then requested that the district court amend its certification order to add the questions of whether future wage loss and punitive damages were recoverable. The district court agreed and entered the amended order cited at Pet. App. 78a, the relevant portion of which reads as follows:

**ORDER**

> For the reasons set forth in the accompanying Memorandum:
>
> 1. The certification pursuant to 28 U.S.C. § 1292(b) contained in the order of June 3, 1993, is hereby AMENDED to read as follows:
>
> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. . . . The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of

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[10] *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). Pet. App. 67a, 71a-72a.

> action. The questions of law certified to the Court of Appeals are whether, pursuant to such a [federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

By order dated July 16, 1993 and pursuant to Fed. R. App. P. 5(a), the court of appeals granted permission for interlocutory appeal on these related issues. Pet. App. 84a. The appeals were consolidated, briefs submitted and oral argument took place on April 13, 1994 before Judges Becker, Mansmann and Scirica. The panel's opinion and judgment were issued on November 2, 1994. Pet. App. 1a and 44a.

The questions of law certified to the court of appeals by the district court below involved the measure of damages recoverable in a federal maritime death action. On appeal, however, the Third Circuit decided the answers to the certified questions depended upon a reexamination of the premise underlying the district court's decision, i.e., that the Calhouns' rights were to be determined under federal maritime law. Since the court of appeals concluded that the *Moragne* remedy did *not* apply to this case, the questions originally certified by the district court were never reached. Pet. App. 4a; 40 F.3d at 625. Instead, having dismissed the *Moragne* remedy, the court of appeals held there was no body of federal law applicable to the death of a recreational boater in territorial waters and that state law should therefore apply. Pet. App. 4a; 40 F.3d at 625.

Accordingly, the district court order granting Yamaha partial summary judgment and precluding recovery for

lost future wages and punitive damages was reversed, and the order denying partial summary judgment on loss of society damages was affirmed. Pet. App. 4a and 43a; 40 F.3d at 625, 645. The case was remanded to the district court for further proceedings, including a preliminary determination of whether plaintiffs' claims should be governed by the law of Pennsylvania or Puerto Rico. App. 4a and 42a; 40 F.3d at 625, 644.

On February 17, 1995, Yamaha filed a petition for writ of certiorari seeking review of the Third Circuit Court of Appeals' decision that damages in a recreational boating death case on territorial waters should be determined under state statutory law rather than general federal maritime law. Yamaha also sought clarification as to the elements of damages permitted under a general maritime death action. On May 22, 1995, this Court granted the petition only with respect to the first question, but asked the parties to also brief and argue a procedural question relating to the scope of appellate jurisdiction in interlocutory appeals. (*See* Petition for Writ of Certiorari, Question Presented, No. 1, and this Court's May 22, 1995 Order Allowing Certiorari, J.A. 40.)

## SUMMARY OF ARGUMENT

In the last twenty-five years, nearly every court facing the issue has worked toward the uniform nationwide body of maritime law envisioned by this Court when it decided *Moragne*. Using the federal maritime statutes as a

guide, the national jurisprudence has moved consistently toward a body of law in which all maritime claimants receive substantially identical remedies, regardless of whether the accident occurs within territorial waters or on the high seas, and regardless of whether the victim is a seaman or a civilian.[11]

Ignoring *Moragne*, the court of appeals disavowed the existence of a federal maritime remedy applicable to recreational boaters in territorial waters. Instead, the court ruled that the remedies available to the survivors of such accidents would depend on state law.

The decision of the court of appeals is unsupported by post-*Moragne* authority. It misapprehends *Moragne* and a series of later decisions of this Court and is inconsistent with decisions from the Second, Fifth, Sixth, Eighth and Ninth Circuits. The real problem with the decision, however, lies not in why it was wrongly decided but in the effect it will have if allowed to stand. Unless reversed, this decision will sound the death knell to the fundamental concept of maritime jurisdiction – its uniformity – this Court has spent decades creating.

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[11] The court of appeals used the term "recreational boater" and "non-seaman" interchangeably, even though the latter describes a broader category including, but not limited to, longshoremen, harbor workers and cruise ship passengers, in addition to recreational boaters. Petitioners have attempted to clarify this terminology by utilizing the term "civilian" to cover all "non-seaman," with further specificity depending on the factual circumstances of each case.

## ARGUMENT

### I. THIS COURT INTENDED FOR *MORAGNE* TO PROVIDE THE EXCLUSIVE REMEDY FOR MARITIME WRONGFUL DEATHS NOT COVERED BY FEDERAL STATUTE

In order to resolve the issue accepted for review, this Court must answer one relatively straightforward question: whether the general maritime remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) applies to wrongful death cases involving recreational boaters in territorial waters. The court of appeals answered this question in the negative. However, it further held that even assuming *Moragne* was in fact applicable to the *Calhoun* accident, the remedy available would still depend in large part on state law:

> The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, *see infra* at typescript 28-32, 32-39, and that state laws accordingly apply of their own force. Were we to find federal admiralty law governing wrongful death and survival actions applicable to the death of a recreational boater occurring within state territorial waters, however, our analysis would likely lead us to hold that admiralty law either does not displace or adopts (or incorporates) state (or territorial) tort law. *See infra* at n.33.

Pet. App. 10a, n.7; 40 F.3d at 628, n.7.

For the reasons which appear below, the court of appeals erred in concluding that *Moragne* does not apply to the case of a recreational boater. Moreover, that remedy is not only applicable, but exclusive.

### A. Substantive Maritime Law Governs Recreational Boating Accidents In Territorial Waters

The Third Circuit's opinion is premised on the conclusion that federal maritime law does not apply to the death of a recreational boater and that there is therefore no federal law with which state law can conflict. Nevertheless, the court did not question, and could not question, that admiralty jurisdiction extends to recreational boating.

The traditional test for admiralty jurisdiction in a tort case was the locality of the wrong. A case was actionable in admiralty if the incident occurred on navigable waters. *The Plymouth*, 3 Wall. (70 U.S.) 20, 35-36 (1866). Locality remained the sole test of admiralty tort jurisdiction until 1972, when this Court issued its decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), wherein the Court held that admiralty jurisdiction did not extend to the case of an aircraft which had fortuitously crashed into navigable waters after encountering a flock of birds on takeoff for what was going to be an overland flight. After *Executive Jet*, location on or over navigable waters was not in and of itself sufficient to turn an aircraft negligence action into a maritime tort. Admiralty jurisdiction was held to be lacking because the accident did not bear a significant relationship to traditional maritime activity.

The criteria for admiralty jurisdiction were again refined in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a wrongful death action arising from the collision of two recreational boats on navigable waters. This Court determined the cause of action to be cognizable in

admiralty because such an incident implicated the traditional maritime concern of navigation and could possibly disrupt commercial maritime activity. The Court determined that the maritime activity itself need not be commercial so long as it had the potential to impact on maritime commerce.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court upheld admiralty jurisdiction in an action involving a fire aboard a noncommercial vessel docked at a marina located on a navigable waterway. The Court again focused on the potential rather than actual effect on maritime commerce, finding the possible destruction of commercial facilities and/or disruption of traffic to be sufficient to establish jurisdiction.[12] The Court observed that, "[t]he need for uniform rules of maritime conduct

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[12] Justice Scalia, in a concurring opinion in which he was joined by Justice White, stated that he did not agree with the test applied by the majority and that "our clear case law extended admiralty jurisdiction to all torts involving vessels on navigable waters." 497 U.S. at 368. More recently, in his concurring opinion in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S. Ct. 1043 (1995), Justice Thomas, joined by Justice Scalia, wrote:

> I would restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States. If so, then admiralty jurisdiction exists. This clear, bright-line rule, which the Court applied until recently, ensures the judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction.

*Id.* at 1055-56.

and liability . . . extends at least to . . . activities traditionally undertaken by vessels, commercial or noncommercial." *Id.* at 367.

With the exercise of admiralty jurisdiction comes the application of the full body of substantive maritime law. *See, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S.Ct. 1043 (1995); *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986), citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (*per curiam*), *cert. dismissed*, 513 U.S. ___, 115 S. Ct. 31 (1994). As this Court recognized in *Foremost*:

> Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce.

*Foremost*, 457 U.S. at 674-75 (*emphasis in original*).

The *Foremost* Court stressed the importance of extending admiralty jurisdiction to all aspects of maritime activity. The Court further recognized that this exercise of jurisdiction would be pointless unless the courts which assumed that authority were all applying the same law. Read in the light of

*Foremost, Moragne* can only have meaning if it is construed as preemptive of state law.[13]

The court of appeals recognized that this case was properly one of admiralty jurisdiction (Pet. App. 7a, n.5), and that with admiralty jurisdiction comes the application of substantive admiralty law. Pet. App. 8a. The court further conceded that even if subject matter jurisdiction were founded solely on diversity of citizenship, "a federal maritime rule of decision applicable to the controversy would still displace a state rule that was in conflict." Pet. App. 7a, n.5; 40 F.3d at 626, n.5. Nevertheless, based on its analysis of the maritime preemption doctrine most recently addressed by this Court in *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994), the court of appeals concluded state law would apply because there was no "clear conflict" between state

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[13] The opinion of the Court of Appeals for the Fifth Circuit is even more explicit:

> If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

*Foremost v. Richardson*, 641 F.2d 314, 316 (CA5 1981).

and federal law. Pet. App. 39a. *American Dredging* does not, however, support the court's decision.

*American Dredging* arose when a seaman was injured while in the course of his employment in Pennsylvania. After receiving medical treatment in Pennsylvania, New York and Mississippi, he eventually filed suit in Louisiana state court seeking damages under the Jones Act and general maritime law. American Dredging obtained a dismissal of the action under the doctrine of *forum non conveniens*. After a lower appellate court affirmed, the Supreme Court of Louisiana reversed the dismissal, upholding the validity and applicability of a state law revoking the doctrine of *forum non conveniens* in Jones Act cases. American Dredging's petition for certiorari was granted, the issue being whether the Louisiana statute abolishing *forum non conveniens* had been preempted by federal maritime law.

In considering whether federal law was preemptive, the Court recognized the traditional coextension of state and federal admiralty jurisdiction. The Court also conceded its previous decisions in this area had not been dispositive:

> [I]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence. Compare *Kossick* [*v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961)] (state law cannot require provision of maritime contract to be in writing), with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955) (state

> law can determine effect of breach of warranty in marine insurance policy).

*American Dredging*, 510 U.S. ___, 114 S. Ct. at 987-88. While recognizing the lack of clarity in this Court's prior decisions, the court of appeals overlooked the very guidance it was seeking, which appears immediately following the language quoted above:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

*American Dredging*, 114 S. Ct. at 988.

Justice Souter's concurring opinion is even more succinct:

> I join in the opinion of the Court because I agree that in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

*American Dredging*, 114 S. Ct. at 990 (Souter, J., concurring).

Here the question is whether state wrongful death statutes or federal maritime common law provide the substantive law of the case. This is therefore not one of the "close cases" in which the distinction between substance and procedure is obscure. Indeed, it would be difficult to imagine an area of law more clearly substantive. Thus, even under an *American Dredging* analysis, general maritime law applies.[14]

### B. *Moragne* And Its Progeny Provide The Substantive Law Applicable To All Deaths On Territorial Waters

#### 1. Pre-*Moragne* – Statutory Maritime Remedies

Between 1886 and 1970, federal maritime law did not provide a remedy for wrongful death on the nation's territorial waters unless the decedent qualified as a seaman under the Jones Act, 46 U.S.C. § 688. In *Moragne v. States Lines, Inc.*, 398 U.S. 375 (1970), this Court reversed three quarters of a century of precedent and recognized "a right to recover for wrongful death under general maritime law." *Id.* at 401. This right was established to "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.*

The decedent in *Moragne* was a longshoreman, rather than a recreational boater. Since *Moragne*, however, this Court and others have consistently and unequivocally

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[14] The *American Dredging* case is discussed in greater detail in Petitioners' letter brief dated April 20, 1994 and submitted at the request of the court of appeals following oral argument. This brief appears at J.A. 16.

applied the general maritime remedy announced in *Moragne* to all categories of decedents killed on territorial waters. The reasons for this expanded application can only be understood in the context of the problems *Moragne* was intended to correct.

Seventy-five years before *Moragne*, in *The Harrisburg*, 199 U.S. 199 (1886), this Court held that federal maritime law did not provide a remedy for wrongful death in the absence of an applicable state or federal statute. No federal maritime statutes were in force at that time, and many or most of the states followed the English common law rule precluding recovery for wrongful death under any circumstance. In the latter part of the nineteenth century, states began enacting wrongful death statutes, some of which extended for the benefit of those killed on territorial waters or the high seas.[15]

The efficacy of applying state statutes to what were essentially maritime claims was called into serious question by this Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, the Court precluded application of a New York state workmen's compensation statute to a longshoreman on board a vessel docked in navigable waters as an unconstitutional invasion of federal interests. In the words of the Court, "the necessary consequences [of the allowance of the state law remedy] would be the destruction of the very uniformity in respect to

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[15] For deaths which occurred on the high seas, recovery could only be pursued under a limited number of state wrongful death statutes. *The Hamilton*, 207 U.S. 398 (1907). Since few state statutes were interpreted to apply on the high seas, most deaths on the high seas did not permit a cause of action. *Moragne*, 398 U.S. at 393 n.10.

maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded." *Id.* at 217.

After *Jensen*, questions continued to arise regarding the appropriate substantive law to be applied in admiralty. Some state statutes permitted recovery for maritime deaths; others did not. What was to happen when a death occurred in waters at the border of two states – only one of which offered a maritime death remedy? Was it fair, in a federal system of law, for two claimants to receive different compensation under circumstances indistinguishable apart from their state citizenship? As far as the maritime death action had evolved, differing substantive laws would apply and different remedies awarded, based solely on the fortuitous location of the injury. Aware of the inequities of this situation, Congress took the first steps toward effectuating a uniform structure of maritime recovery by passing a series of landmark statutes.

The first of these statutes was the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68, which provided a remedy for deaths which occurred at sea more than a marine league (three nautical miles or 3.45 land miles) from the shore of any state, district, territory or dependency of the United States. The right of action under DOHSA accrues to the personal representative of the decedent for the exclusive benefit of the decedent's spouse, parent(s), child(ren) or dependent relative. 46 U.S.C. § 761. Recovery under DOHSA is limited to fair and just compensation for the pecuniary losses sustained by the persons for whose benefit suit is being brought

and is to be apportioned among them in proportion to the loss each has suffered. 46 U.S.C. § 762.

The second maritime statute passed by Congress was the Merchant Marine Act of 1920 (also known as the Jones Act), 46 U.S.C. § 688. The Jones Act death action extended to seamen the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 1, *et seq.*, granting seamen a personal injury and wrongful death remedy for the negligence of their employers. A wrongful death claim under the Jones Act must be brought by the personal representative of the deceased for the benefit of a specified class of beneficiaries, which include the surviving spouse and children, and if none, then the seaman's parents, and if none, dependent next of kin. The Jones Act has also consistently been interpreted to limit recoverable damages to pecuniary losses. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 20, 32 (1990).

The statutory framework of maritime remedies was completed in 1927 with the passage by Congress of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, which granted to longshoremen and harbor workers the right to receive workers' compensation benefits from their employers for accidental injury or death arising out of their employment. The LHWCA preempted state compensation statutes and provided a uniform remedy to the land-based maritime employee. 33 U.S.C. § 901, *et seq.*[16]

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[16] In 1972, Congress amended the Act, revoking the right to bring an action for unseaworthiness, but permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. § 905(b).

Although these three statutes made major inroads toward maritime uniformity, they were not sufficient to accomplish this goal in and of themselves because none of them applied to the deaths of non-Jones Act seamen in territorial waters. Recovery in such cases continued to depend on whether and the degree to which the law of the state adjacent to the accident recognized an action for maritime wrongful death. Since there was no uniform body of maritime wrongful death law, the potential existed for as many different remedies (or no remedy at all) as there would be states addressing deaths on their territorial waters.

### 2. *Moragne* – Filling The Gap

It was against this backdrop that the Court accepted certiorari in *Moragne*, which involved an unseaworthiness claim asserted by the widow of a longshoreman killed in Florida's territorial waters. Since the law of Florida did not provide for a wrongful death action based on unseaworthiness, the widow's claim was barred by the rule of *The Harrisburg*. The United States, as *amicus curiae*, urged the Court to eliminate the anomalies created by *The Harrisburg* and reestablish uniformity in maritime wrongful death law by creating a general federal maritime action for wrongful death caused by negligence or unseaworthiness and applicable in all territorial waters. Noting that every state in the union had by then enacted a wrongful death statute, *Moragne*, 398 U.S. at 390, and that Congress had enacted the Jones Act and DOHSA, this Court concluded that such actions were by then part of the nation's basic jurisprudence. By unanimous

decision, the Court overruled *The Harrisburg*, thus establishing a general maritime wrongful death action which would complement the federal maritime statutes.

### 3. Post-*Moragne* – Sealing the Cracks

In 1990, this Court decided *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). *Miles* was a claim by the mother of a Jones Act seaman who was murdered while on board a vessel docked in the territorial waters of the State of Washington. Mrs. Miles alleged both Jones Act negligence and breach of the warranty of seaworthiness under general maritime law and sought damages for both wrongful death and survival.

Much of the *Miles* opinion is devoted to the legal history of the maritime death action, with particular attention to the rationale and objectives of the Court in *Moragne*. The *Miles* Court noted the statutory attempts to "achieve uniformity," the anomalies created by unanticipated jurisprudential developments, and the government's plea, as amicus, "to eliminate these inconsistencies and render maritime wrongful death law uniform." *Miles*, 498 U.S. at 26. The Court "described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. . . . ", *Id.* at 27, and specifically concluded that "*Moragne* intended to create a general maritime wrongful death action applicable *beyond the situation of longshoremen.*" *Id.* at 30 (emphasis added). The Court further held that, in the context of *Miles*, *Moragne* extended the DOHSA wrongful death remedy to territorial waters, 498 U.S. at 29, and that such extension

"will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction.' " *Id.* at 29 (citing *Moragne*, 398 U.S. at 396, n.12).[17]

This Court has not directly ruled on *Moragne*'s applicability to accidents involving civilians. The question has, however, previously been before the Court. In *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908, (1991), the decedent, like Natalie Calhoun a civilian, stopped to help the captain of a shrimp boat free his propeller and was killed when a wave unexpectedly crushed him against a dock. The decedent's estate sued in Texas state court for negligence and violation of maritime regulations under the Texas Wrongful Death and Survivorship Statutes. The trial court, applying Texas state tort law, rendered judgment against Texaco and awarded damages for the survivors' mental anguish, loss of society and prejudgment interest. The Texas Court of Appeals affirmed. 777 S.W.2d 783. Subsequently, this Court granted certiorari, vacated the appellate judgment, 497 U.S. 358, and remanded the

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[17] In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), Justice Stevens writing for the majority stated:

> *Moragne* proclaimed the need for uniformity in a far more compelling context. When *Moragne* was decided, fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State. The only disparity which concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land.

*Id.* at 624, n.18.

cause of action to the Texas Court of Appeals for further reconsideration in light of its then-recent ruling in *Sisson v. Ruby*, 497 U.S. 358 (1990). On remand, the Texas Court of Appeals reaffirmed its original decision, 795 S.W.2d 870, and the case proceeded to the Supreme Court of Texas.

The Texas Supreme Court concluded the Texas Court of Appeals had erred in its application of state tort law and, accordingly, reversed. Finding general maritime jurisdiction appropriate, the court stated:

> Where applicable *and* properly invoked, general maritime law preempts state law causes of actions and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, Art. 3, § 2, cl. 1.

*Dau Van Tran*, 808 S.W.2d at 63, (emphasis in original) citing *Foremost*, 457 U.S. 668, 676-77 (1982). The Texas Supreme Court then awarded damages to the surviving parents according to federal maritime law. When again asked to review the case, this time by the decedent's estate, this Court declined to do so. *Dau Van Tran*, 502 U.S. 908 (1991).

Other courts have expressly recognized the applicability of *Moragne* in circumstances similar or identical to this case. In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 510 U.S. ___, 114 S. Ct. 1060 (1994), a case which is factually indistinguishable from this case, the Second Circuit stated:

> The Court [in *Moragne*] was addressing the specific issue of what, if any, remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness,

> a claim for which there was no remedy under applicable state law. [*Moragne* at 376-77]. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law.

Scott Wahlstrom was killed when his personal watercraft collided with a 20-foot powerboat on the Thames River, a navigable waterway located in Connecticut. While conceding that the case fell within the admiralty jurisdiction of the federal courts, the plaintiffs argued federal maritime law did not preclude application of individual state wrongful death statutes and that Connecticut products liability and wrongful death laws should therefore govern their cause of action. In the alternative, the plaintiffs maintained that if the court found federal maritime law governed, it should look to the Connecticut wrongful death provisions in fashioning the federal remedy.

The Second Circuit rejected both of these assertions. Recognizing the importance of uniformity in maritime law, the court held that wrongful death under the general maritime law necessarily excludes the peculiarities of individual state remedial statutes. 4 F.3d at 1089. Premising its holding on this Court's precedent, "which over the past thirty-three years [sic], has transformed the face of the federal maritime wrongful death remedy," the Second Circuit held that federal maritime law, whether or not in conflict with an individual state's law, precludes application of state law and governs all actions for wrongful death and survival occurring in navigable territorial waters falling under the admiralty jurisdiction of the federal courts. *Id.* at 1087-89.

Other courts addressing the question of substantive law applicable to deaths involving recreational boats on state waters have uniformly applied the *Moragne* remedy. *See, e.g., Kelly v. Panama Canal Comm'n*, 26 F.3d 597 (CA5 1994) (recreational boating accident on Panama Canal, general maritime law will apply to death claim); *Walker v. Braus*, 995 F.2d 77 (CA5 1993) (recreational boating collision on state inland waterway, federal maritime law will determine recovery for wrongful death); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988) (recreational boat capsized in Lake Michigan, survivors' claims to be determined under federal maritime law, not state law), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (CA8 1972) (survey boat capsized on Red River in Arkansas, court recognized general maritime death action, not state remedial statutes); *Sutton v. Earles*, 26 F.3d 903 (CA9 1994) (collision between pleasure boat and Navy buoy, applicable substantive law for death actions is general maritime law). *See also Barbe v. Drummond*, 507 F.2d 794 (CA1 1974) (DOHSA action involving recreational boat, court recognized federal maritime survival action analogous to *Moragne* wrongful death action); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (CA4 1972) (general federal maritime law applies to death of longshoreman on territorial waters); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (CA8), *cert. denied*, 419 U.S. 884 (1974) (recreational boat accident on Arkansas River, federal maritime law preempts application of state law); *Mink v. Genmar Indus., Inc.*, 29 F.3d 1543 (CA11 1994) (maritime recreational injury case comes within admiralty jurisdiction, substantive federal maritime law applies, including

uniform three-year statute of limitations for maritime torts, 46 U.S.C. § 763a (Supp. 1993)).

In addition to the Courts of Appeal noted above, numerous federal district and state supreme courts have held that federal maritime law will displace state law in the civilian/recreational maritime death context. In *Gilmore v. Witschorek*, 411 F. Supp. 491, 494 (E.D. Ill. 1976), a recreational boat death case, the court made the following ruling on a motion to dismiss, stating:

> The United States Supreme Court thus created a general maritime claim for wrongful death clearly applicable to a situation such as this [a collision between two pleasure boats], where the accident allegedly occurred on state navigable waters. The existence of this new right avoids the application of state wrongful death statutes and brings the claim within the ambit of the general maritime law where suits are governed by federal substantive law and procedural law.

*See also Choat v. Kawasaki Motors Corp.*, No. 1920544, 1994 WL 221417 (Ala., May 27, 1994) (swimmer killed by "jet ski" on navigable waters, with admiralty jurisdiction comes application of substantive maritime law); *Newhouse v. United States*, 844 F. Supp. 1389 (D. Nev. 1994) (collision between recreational boat and vessel operated by the U.S. Park Service; court applied federal maritime law); *Frantz v. Brunswick Corp.*, 866 F. Supp. 527 (S.D.Ala. 1994) (general maritime law governs damages recoverable from recreational boating accident); *Lipworth v. Kawasaki Motors Corp., U.S.A.*, 592 So. 2d 1151 (Fla. Dist. Ct. App.) (federal maritime law, not state law, applies to "jet ski" collision death), *cert. denied*, 506 U.S. ___, 113 S. Ct. 465 (1992); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992) (death resulting from collision between

two personal watercraft, federal maritime law, not state remedial statutes, controls); *Texaco Ref. & Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.) *cert. denied*, 502 U.S. 908 (1991); *Estate of Fajardo v. Maersk Line Agency, Inc.*, No. Civ. A. R-88-274, 1988 WL 168532 (D. Md., Nov. 30, 1988) (drowning death of minor child caused by passing ship's wake, claim determined under federal maritime law, not state law); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987) (pleasure boat collision with bridge results in death, general maritime death action precludes state remedial statutes in territorial waters).[18]

### C. The Decision Of The Court Of Appeals Is Not In Accordance With Maritime Law

#### 1. There Is No Split Of Authority: *Moragne* Displaces State Wrongful Death Statutes

While conceding that "Yamaha has been able to muster considerable support for its position that *Moragne* displaces all state law wrongful death statutes" (Pet. App. 35a, n.37; 40 F.3d at 641, n.37), the court of appeals says the case law "appears to be split on this issue." *Id.* There is no such split.

The cases cited by the court of appeals as evidencing the split of authority do nothing of the sort. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (CA1), *cert. denied*, 508

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[18] Thomas Schoenbaum also acknowledges federal preemption of state law remedies in his treatise, *Admiralty and Maritime Law*, § 8-3 (2d ed. 1994). Discussing the *Moragne* wrongful death action, he states: "Thus the new *Moragne* wrongful death action preempts state wrongful [death] [sic] statutes within the area of admiralty jurisdiction." *Id.* at 472 (citations omitted).

U.S. ___, 113 S. Ct. 2987 (1993), was an employment discrimination case in which the employer removed the plaintiff from his position as chief engineer of a tanker because he had completed an alcohol rehabilitation program. The Third Circuit cited *Ellenwood* for the premise that, in areas in which Congress has not entirely displaced state regulation, state law will be given effect if it does not frustrate a fundamental tenet of admiralty law. In *Ellenwood*, however, there was no well-established body of maritime employment discrimination law. In this case, there exists a large body of federal maritime wrongful death law that has steadily evolved since the *Moragne* decision in 1970. In fact, the *Ellenwood* court itself recognized and noted the importance of *Moragne* and its progeny:

> Maritime law historically has appreciated the leading role of state statutes in creating additional bases of recovery. *In maritime wrongful death cases, for example, remedies first were provided solely under state law.* When Congress enacted maritime wrongful death legislation in 1920, it provided remedies only where state law did not. *State statutes continued to play a primary role for another fifty years, until the Supreme Court created a general maritime cause of action for wrongful death. See Miles*, 498 U.S. at 23-27; *Moragne*, 398 U.S. at 398-402.

*Ellenwood*, 984 F.2d at 1280 (emphasis added; citations and footnotes omitted). The use of the words "first" and "until" in this quoted portion of the opinion clearly signals a recognition that, after *Moragne*, state statutes for wrongful death are supplanted by the federal maritime law.

The Third Circuit also referenced *Lyon v. Ranger III*, 858 F.2d 22 (CA1 1988), for the proposition that Massachusetts law would provide the rule of decision for a wrongful death in Massachusetts' territorial waters. This is an incorrect interpretation of this holding. In *Lyon*, the survivors of a scuba diver who was struck and killed by a whale-watch ship brought a wrongful death action under *Moragne*. *See, Lyon*, 858 F.2d at 24. The court only applied Massachusetts law to the very specific issue of whether the negligence of the plaintiff's fellow divers should be imputed to the deceased diver under the theory of joint enterprise liability, an issue admiralty law had not addressed. Massachusetts law was *not* applied to the question of damages for wrongful death; in fact, the wrongful death aspects of the *Lyon* case were determined under federal maritime law, applying *Moragne*.

In *Favorito v. Pannell*, 27 F.3d 716 (CA1 1994), a 12-foot inflatable yacht tender collided with two vessels moored in the harbor at Newport, Rhode Island. Two of the tender's passengers were injured. The Third Circuit noted that substantive Rhode Island law was applied to this maritime collision case. However, *Favorito* is plainly distinguishable since it is not a death case and *Moragne* is therefore not implicated. Moreover, just as in *Lyon*, the *Favorito* court looked to Rhode Island law not for guidance on the issue of damages but for questions such as negligent entrustment and respondeat superior. In fact, maritime cases involving personal injury are also decided pursuant to general federal maritime law. *See, e.g., Medina v. Perez*, 733 F.2d 170 (CA P.R.), *cert. denied*, 469 U.S. 1106 (1984); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (CA1 1988).

*Marine Transportation Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp.*, 16 F.3d 1133 (CA11 1994), was a cargo loss action in which one of the issues before the court was the doctrine of equitable estoppel. In a brief footnote, the Eleventh Circuit mildly chastised the district court for utilizing Florida law and stated that under admiralty jurisdiction, the court should have looked to general maritime law as developed by the federal courts to decide this issue. The Eleventh Circuit went on to say in essence that no harm was done because Florida law is similar to federal common law on this subject. *Python*, 16 F.3d at 1139 n.8.

As *Moragne* and the subsequent cases that have applied and interpreted it make clear, admiralty wrongful death claims arising within territorial waters are not to be decided under state law. Rather, where no federal statute is specifically applicable, the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the accident takes place.

The thrust of the post-*Moragne* cases is contrary in jurisprudential approach to the inferences drawn by the Third Circuit – that state wrongful death statutes apply where maritime accidents occur within a marine league of shore. As this Court stated in *Miles v. Apex Marine*, 498 U.S. 19 (1990), the creation of the general maritime wrongful death cause of action is not only consistent with the general policy of DOHSA and the Jones Act, but effectuates the "constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' " Citing *Moragne, supra*, 398 U.S. at 402, quoting *The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1875).

### 2. The Decision Of The Court Of Appeals Misapprehends *Tallentire* And *Moragne*

The court of appeals relied heavily on this Court's decision in *Off-Shore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), for the proposition that state wrongful death statutes can provide the remedy in this case. That reliance is misplaced. In *Tallentire*, the widows of offshore drilling platform workers killed in a helicopter crash thirty miles offshore sought to obtain death remedies under DOHSA and the Louisiana wrongful death statute. Although the precise holding of *Tallentire* is that DOHSA, where applicable, provides the sole remedy for wrongful death to the exclusion of state law, the Court also engaged in an extensive discussion of Section 7 of that Act, which provides, in relevant part:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act.

46 U.S.C. § 767. The Court concluded that Section 7 was merely intended to recognize concurrent state court jurisdiction to entertain actions brought under DOHSA, making it the functional equivalent of the "savings-to-suitors" clause, 28 U.S.C. § 1333. The "savings-to-suitors" clause permits state courts to adjudicate maritime actions, but " . . . the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie doctrine' which requires that the substantive remedies afforded by states conform to governing federal maritime standards." *Tallentire*, 477 U.S. at 223 (citations omitted).

The court of appeals read *Tallentire* to suggest "that DOHSA was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters." Pet. App. 38a; 40 F.3d at 642. In fact, *Tallentire* says nothing of the sort. The original draft of Section 7 provided that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act *as to causes of action accruing within the territorial limits of any State.*" 477 U.S. at 221 (emphasis added). Thus, *as originally proposed*, Section 7 "ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Id.* at 224-25.

Section 7 was not enacted as it had been originally proposed. In the final version, the phrase emphasized in the above quote from *Tallentire* was deleted. While the Court construed Section 7 to be jurisdictional in nature, the fact remains that, *as enacted*, it does not evidence any intent on the part of Congress "to preserve state wrongful death remedies for the survivors of people killed in territorial waters." Pet. App. 38a; 40 F.3d at 642. To the contrary, one could draw the opposite conclusion, as the language which might arguably have indicated such an intent ended up on the cutting room floor. By suggesting this Court's reference to unadopted statutory language is "tell[ing] us" that state wrongful death statutes continue to govern deaths in territorial waters, the court of appeals misconstrues *Tallentire*.[19]

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[19] This Court has cautioned us that Congressional inaction should not be confused with Congressional intent:

> Nor do we think that Congress' failure to take action on [a bill which would have extended DOHSA to

*Tallentire* does not answer the question of whether the legislative history of DOHSA evinces an intent by Congress to preclude the creation of a maritime common-law wrongful death remedy applicable in territorial waters. The *Moragne* Court, however, squarely addressed this issue and concluded it did not:

> . . . There should be no presumption that Congress has removed this court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the states. However, respondents argue that an intent to do just that is manifested by the portion of the Death on the High Seas Act quoted above [Section 7].
>
> The legislative history of the Act suggests that respondents misconceive the thrust of the congressional concern. . . . The discussion of the bill on the floor of the House evidenced the same concern that a cause of action be provided "in cases where there is now no remedy," 59 Cong.Rec. 4486, and at the same time that "the power of the States to create actions for wrongful death in no way be affected by enactment of

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territorial waters] or to pass a similar measure over the years as the law of deaths on territorial waters became more incongruous, provides guidance for the course we should take in this case. To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." (citations omitted)

*Moragne*, 398 U.S. at 405, n.17.

the federal law." *The Tungus v. Skovgaard*, 358 U.S., at 593, 79 S. Ct., at 507.

Read in light of the state maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.

. . . .

. . . Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.

> To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

*Moragne*, 398 U.S. at 397-400 (footnotes omitted). Thus, *Tallentire* does not support the Third Circuit's decision that state wrongful death statutes remain applicable in territorial waters,[20] for reasons explicit in *Moragne*.

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[20] While the Third Circuit noted that one commentator (referencing 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3672 (Supp. 1994)) believes that the implication of the *Tallentire* decision is that survivors of a person killed in territorial waters may seek recovery under a state wrongful death statute (Pet. App. 24), Judge Pollak correctly disagreed with that commentator's conclusion:

> . . . [T]he Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run *against* a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial waters and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.
>
> . . . .
>
> What I think is clear from Justice Stevens' identification of the two "national rules" is that the Court saw not merely the DOHSA claim but the *Gaudet* claim, which potentially was a more favorable one for the plaintiff, as claims of national architecture. The one was a statutory claim, the DOHSA claim. The other, a judicially created one. To that extent, I think Mobil Oil carried on what was essentially the central logic of

The error of the court of appeals' conclusion that state law remains applicable in territorial waters after *Moragne* is further demonstrated by its reliance on *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). Pet. App. 36a, n.39; 40 F.3d at 641, n.39. In *The Tungus*, a unanimous Court approved the application of state law to a wrongful death that would have otherwise been without remedy under *The Harrisburg*. 358 U.S. at 596. However, the Court split sharply over whether state law was to be wholly incorporated within maritime law subject to its conditions and limitations, 358 U.S. at 592, or whether admiralty law should utilize state law to supply the remedy without its restrictions. *Id.* at 597. Because the *Moragne* Court expressly overruled *The Harrisburg* rather than *The Tungus*, the court of appeals concluded state law remained applicable after *Moragne*. Pet. App. 36a, n.39; 40

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> *Moragne* and *Gaudet* themselves – the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.
>
> . . . .
>
> To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

Pet. App. 63a-65a (emphasis in original).

The Wright, Miller & Cooper analysis of this point also formed the rationale for the Texas Appellate Court's decision in *Dau Van Tran*, 795 S.W.2d 870, when it affirmed its earlier decision and applied state law remedies. Of course, the Supreme Court of Texas later overruled that decision, after which this Court denied further review. *Dau Van Tran*, 502 U.S. 908 (1991).

F.3d at 641, n.39. This conclusion totally misreads this Court's analysis of *The Tungus vis-a-vis The Harrisburg*. In *Moragne*, Justice Harlan wrote:

> The extent of the role to be played by state law under *The Tungus* has been the subject of substantial debate and uncertainty in this Court, *see Hess v. United States*, 361 U.S. 314, 80 S. Ct. 341, 4 L.Ed.2d 305 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340, 80 S. Ct. 357, 4 L.Ed.2d 541 (1960), with opinions on both sides of the question acknowledging the shortcomings in the present law. *See* 361 U.S., at 314-315, 338-339, 80 S. Ct., at 343, 356. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed.

398 U.S. at 378.

The court of appeals concluded the statement that "the primary source of the confusion . . . is not to be found in *The Tungus*, but in *The Harrisburg*" meant *The Tungus* "retains vitality post-*Moragne*." Pet. App. 36a, n.39; 40 F.3d at 641, n.39. Read in context, however, it is obvious the overruling of *The Harrisburg* was anything but an endorsement of *The Tungus*. The primary source of existing confusion was found in *The Harrisburg*, not *The Tungus*, because it was *The Harrisburg*, not *The Tungus*, which permitted application of state law in the first place. Surely in overruling *The Harrisburg*, the Court intended to accomplish more than simply shifting the primary source of confusion to *The Tungus*. If state statutes still apply

after *Moragne*, what did *Moragne* accomplish? How has any confusion been alleviated?

The demise of *The Harrisburg* was intended to leave a uniform national remedy in its wake, and the creation of the *Moragne* remedy rendered *The Tungus* line of inquiry moot. That this Court in *Moragne* in effect, if not explicitly, overruled *The Tungus* and in doing so intended to provide a uniform maritime wrongful death remedy is evidenced in the penultimate paragraph in *Moragne*:

> . . . [I]n contrast to the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus* which followed it, and the problems of federal-state accomodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters.

398 U.S. at 408. State wrongful death statutes thus no longer have a place in maritime law post-*Moragne*.

### 3. The Decision Of The Court Of Appeals Undermines Maritime Uniformity

In fashioning a common law maritime wrongful death remedy in *Moragne*, this Court emphasized the principles of uniformity underlying maritime law:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920

> Acts [referring to DOHSA and the Jones Act] but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall. 558, 575 (1875).

398 U.S. at 401-02 (citations and footnote omitted).

In *Miles*, this Court reaffirmed the importance of uniformity as expressed in *Moragne*, on which the Court "rel[ied] primarily" (498 U.S. at 23):

> There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen. . . . If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.

498 U.S. at 30.

The court of appeals, however, characterized this Court's references to uniformity as mere rhetoric, with "the Court's actions bel[ying] its importance." Pet. App. 26a. The court of appeals "believe[d] that the thrust of [*Moragne*, *Higginbotham*, *Tallentire*, and *Miles*] suggests that the concept of uniformity has a good deal less weight than has been thought. . . . " Pet. App. 27a. A review of these authorities shows the court of appeals has again misunderstood the decisions of this Court.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), this Court expanded the remedies available under *Moragne* to include recovery for loss of society. These

losses, which are non-pecuniary in nature, are not recoverable under DOHSA. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), this Court declined to allow the DOHSA remedy to be supplemented by a general maritime/*Moragne* recovery in order to award damages on the high seas for loss of society. Similarly, in *Off-Shore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986), the Court rejected an attempt to award those same damages in a DOHSA action by supplementation with a state statute which would have allowed recovery for loss of society.

Contrary to the court of appeals' analysis, *Tallentire* and *Higginbotham* do not run against the notion of uniformity. *Gaudet* was decided by the barest of majorities in 1974. By the time *Higginbotham* and *Tallentire* came before the Court, *Gaudet* had been eroded to the point where its continued vitality was in doubt. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987). *Higginbotham* itself limited *Gaudet* to coastal waters. 436 U.S. at 623. In *Miles*, this Court eliminated all doubt, wherein it held that the survivors of a seaman killed in territorial waters could not supplement their Jones Act recovery by obtaining loss of society damages under *Gaudet*. In so ruling, the Court stated, "[t]he holding of *Gaudet* applies only in territorial waters and it applies only to longshoremen." *Miles*, 498 U.S. at 31. As the Sixth Circuit recently stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (CA6 1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled." *Id.* at 1459.

Uniformity of remedy has been and remains today the touchstone of the decisions of this Court. Viewed as steps along the progression from *Moragne* to *Miles*, *Tallentire* and *Higginbotham* are indicative of the consistent efforts of this Court to unify the remedy for maritime wrongful deaths. Although *Higginbotham* and *Tallentire* both fostered *temporary* disunity between the DOHSA and the *Moragne* general maritime action, the refusal to extend *Gaudet* to the high seas enabled the Court to obtain *long-term* uniformity by implicitly but effectively overruling *Gaudet* in *Miles*. This is precisely what the *Miles* Court intended:

> Our decision also remedies an anomaly we created in *Higginbotham*. Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under *Gaudet*, and deaths on the high seas. We recognized the value of uniformity, but concluded that a concern for consistency could not override the statute. *Higginbotham*, 436 U.S., at 624, 98 S. Ct., at 2014. Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

498 U.S. at 33. The Third Circuit's decision trivializes and disregards this uniformity principle and, if allowed to stand, would negate the efforts of this Court in *Moragne*, *Higginbotham*, *Tallentire*, and *Miles*. Instead, this Court should continue its efforts to provide a uniform remedy by reversing the court of appeals' decision in this case

and expressly declaring *Moragne* and *Miles* applicable to *all* deaths in territorial waters.

## II. THE COURT OF APPEALS HAD AUTHORITY, PURSUANT TO 28 U.S.C. § 1292(b), TO EXERCISE JURISDICTION OVER ANY QUESTION INCLUDED WITHIN THE CERTIFIED ORDER

Rather than addressing the questions of law certified to it, the court of appeals addressed another aspect of the certified order – the underlying premise "that admirality jurisdiction attaches to these several counts [of the complaint] and that they constitute a federal maritime cause of action." Pet. App. 78a. The court of appeals could take this approach because the question it addressed was both included within the order certified for appeal and so inextricably intertwined with the district court's certified question as to be necessary to ensure meaningful review of the latter. As such, the action of the court of appeals was within the letter and intent of 28 U.S.C. § 1292(b), and is consistent with this Court's decisions in *United States v. Stanley*, 483 U.S. 669 (1987) and *Swint v. Chambers County Comm'n*, 514 U.S. ___, 115 S.Ct. 1203 (1995).

In 1958, Congress amended 28 U.S.C. § 1292 to add subsection (b), which provided as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals

> which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Subsection (b) gave discretion to the courts to entertain interlocutory appeals under circumstances broader than those specifically enumerated under 28 U.S.C. § 1292(a). Under subsection (b), appellate jurisdiction is discretionary on two levels. First, the district judge may or may not certify that the order involves a controlling question of uncertain resolution. If the district court makes this determination, the court of appeals may or may not accept the appeal.

Although § 1292(b) obligates the district court to state that the order in question involves a controlling question of law, it does not require the judge to precisely frame the question. 16 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3929 (1977). As such, even where (as in the case herein) the district judge certifies a particular question, most courts have recognized that the court of appeals is not bound by the formulation of the question. Rather, since the appeal is from the order, the court may address any issue necessary to decide the appeal. *See, e.g., Dailey v. National Hockey League,* 987 F.2d 172 (CA3 1993) (where certified question was whether ERISA claim precluded dismissal of action under *Princess Lida* doctrine, court was entitled to determine whether *Princess Lida* doctrine would apply in any event); *In re Cinematronics,* 916 F.2d 1444 (CA9 1990) (certified order

permitted jury trial in "core" bankruptcy proceeding; court of appeals could properly consider whether proceeding was in fact "core" in nature). This Court has also permitted discretionary interlocutory appeals of issues closely related to the decision certified for review. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986) (court of appeals reviewing district court's ruling on preliminary injunction request properly reviewed merits as well); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-83 (1974) (court of appeals reviewing district court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954) (court of appeals reviewing order granting motion to dismiss properly reviewed order denying opposing party's motion to remand); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss), all cited in *Swint v. Chambers County Comm'n*, 514 U.S. ___, 115 S. Ct. 1203 (1995).

The latitude granted to the court of appeals is not unlimited. In *United States v. Stanley*, 483 U.S. 669 (1987), a former serviceman who alleged he had secretly been given LSD brought an action against a number of military officers and civilians. The action purported to state separate claims under the Federal Tort Claims Act ("FTCA") and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The district court dismissed the FTCA claim, but allowed the *Bivens* count to stand. The court later vacated that portion of its decision relating to the *Bivens* claim. Upon reconsideration, the district court reaffirmed its decision in *Bivens*, but certified its order

pursuant to 28 U.S.C. § 1292(b). On review, the Court of Appeals for the Fifth Circuit affirmed the district court's decision on the *Bivens* claim. Moreover, even though the order from which the interlocutory appeal was taken made no mention of the FTCA count, the court of appeals concluded the plaintiff might have a FTCA claim under recent decisions interpreting the act, and instructed the district court to permit him to amend his complaint.

On appeal, this Court vacated that portion of the decision which had reinstated the FTCA claim:

> An appeal under this status is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the 'order,' not the question, before the court), that jurisdiction *is* confined to the particular order appealed from. Commentators and courts have consistently observed that 'the scope of the issue open to the court of appeals is closely limited to the order appealed from [and] [t]he court of appeals will not consider matters that were ruled upon in other orders.' 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, p. 143 (1977). See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281, n. 3 (CA8 1984), cert. dism'd, 472 U.S. 1022, 105 S. Ct. 3491, 87 L.Ed.2d 625 (1985); *United States v. Bear Marine Services*, 696 F.2d 1117, 1119, n. 1 (CA5 1983); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (CA5 1970).
>
> Here, the 'order appealed from' was an order refusing to dismiss Stanley's *Bivens* claims on the basis of our holding in *Chappell*. The Court

> of Appeals therefore had no jurisdiction to enter orders relating to Stanley's long-dismissed FTCA claims, whether or not, as Stanley argues, 'the issues involved in the *Bivens* claim and the alleged immunity of the individual defendants closely parallels [sic] the government's immunity due to the *Feres* doctrine . . . [and] that is that all parties were arguing about in the interlocutory appeal.'

*Stanley*, 483 U.S. at 677.

This Court has again recently addressed § 1292(b), although indirectly, in *Swint v. Chambers County Commission*, 514 U.S. ___, 115 S. Ct. 1203 (1995). In *Swint*, the Court of Appeals for the Eleventh Circuit accepted jurisdiction of an order denying summary judgment to individual police officer defendants in a case arising out of alleged civil rights violations in connection with a series of raids on a nightclub. Although the order in question was not certified by the district court pursuant to § 1292(b), the order was appealable because the court had rejected the officers' assertion of qualified immunity to suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The County Commission, which had also filed a summary judgment motion which was denied, also appealed, alleging the denial was immediately appealable as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Alternatively, the Commission alleged the court of appeals had pendent jurisdiction to consider the Commission's appeal in conjunction with that advanced by the individual defendants.

The court of appeals rejected the collateral order argument, but determined it had "pendent appellate jurisdiction." In rejecting this conclusion, this Court

addressed the statutory limitations of discretionary appellate jurisdiction:

> Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

*Swint*, 115 S. Ct. at 1210 (footnote omitted). Of particular importance to this Court was the legislative history of § 1292(b), wherein a proposal which would have vested the discretion to hear an interlocutory appeal solely with the courts of appeals was rejected. *See Swint*, 115 S. Ct. at 1210, n.4.

The actions of the court of appeals herein are consistent with the express language of § 1292(b) and its historical interpretation, and do not run afoul of any of the proscriptions announced by this Court. The amended order certified by the district court (Pet. App. 78a) reads as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at

> the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Fairly read, the order asks whether the Calhouns may recover certain items of damages. While not doing so directly, the court of appeals did answer the question: they may recover those damages if state law so provides. Moreover, the district court's order includes the conclusion that "admiralty jurisdiction attaches to [the Calhouns'] several counts and . . . they constitute a federal maritime cause of action." The court of appeals' analysis directly addresses this point, which is both part of the order under appeal and "necessary to decide the appeal." *See, e.g., Dailey, supra.; In re Cinematronics, supra.* The decision does not involve a separate order, as with *Stanley* and *Swint*, and does not substitute the discretion of the court of appeals for that of the district court as to the subject matter of the appeal. For these reasons, the court of appeals acted within its authority under 28 U.S.C. § 1292(b).

## CONCLUSION

For the reasons set forth in Section I of this brief, petitioners respectfully urge this Court to reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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